Judge Dowd, effectively holding that "Petitioner's awareness of the DRP and her failure to quit her job [after October 1, 2001] were enough" to find that she had assented to the terms of the DRP and that she was bound to arbitrate her disputes with the Company. (Pet. 11, n.7). She then filed the present Petition with this Court, seeking review from the decisions below.

REASONS FOR DENYING THE PETITION

In each of her purported Questions Presented for Review, Petitioner fails to show how the decision below conflicts on a matter of federal law with any decision in the federal circuit courts, with any decision of the Supreme Court of Ohio, or, for that matter, with the decisions of any other court in this country. In fact, her "Questions" are not really questions at all; two of them state propositions of law which have not been adopted by any known American court, while the other two conversely state settled propositions of law which are not the subject of dispute between any known jurisdictions, and which were properly applied to the facts of this case in the proceedings below.

Thus unable to raise a legal challenge to the decision below, Petitioner turns to an attack on the factual findings in the record. She contends that, based on her refusal to sign the DRP, she did not assent to its terms, and thus did not waive her right to a trial by jury. This argument failed as a matter of law below, but Petitioner nevertheless resorts to a desperate attempt to add to the "facts" she presented in the record below and re-argue her case here. Unfortunately for Petitioner, not even these added "facts", which are not a part of the record properly before this Court, can provide her with a basis for her Petition; the courts below properly applied the applicable law to find that she assented to and is bound by the DRP.

I. The Petition Does Not Present a Conflict in the Law.

A. The First and Fourth of Petitioner's Questions Presented for Review State Legal Propositions Which Have Not Been Adopted by Any Known Court in This Country.

1. "Clear and Unmistakable" Evidence of Waiver

In her first Question Presented for Review, Petitioner asserts that an at-will employee's intent to waive his or her right to a jury trial by entering into an arbitration agreement "must" be established to the heightened "clear and unmistakable" standard of evidence. As support for this sweeping mandate, Petitioner cites . . . nothing. She was unable to provide any precedent for her position because this Court specified in *Wright v. Universal Marketing Services Corp.*, 525 U.S. 70 (1998), that, for at-will employees like the Petitioner, the waiver of jury trial rights does *not* require a heightened evidentiary showing to the "clear and unmistakable" standard. *Wright*, 525 U.S. at 80-81 (finding that in cases that "involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees . . . the 'clear and unmistakable' standard was not applicable"). *See also Ahing v. Lehman Bros.*, 94Civ.9027(CSH), 2000 U.S. Dist. LEXIS 5175 at *14-16 (S.D.N.Y. Apr. 20, 2000) (noting that non-at-will employees subject to "union-negotiated collective bargaining agreements" containing arbitration agreements "were specifically distinguished from [at-will employees subject to] individually executed arbitration agreements . . . and hence the 'clear and unmistakable' standard was not applicable" to the latter); *Jones v. Fujitsu Network Communs., Inc.*, 81 F. Supp. 2d 688, 691 (N.D. Tex. 1999) (noting Plaintiff's "misplaced" reliance on the "clear and unmistakable" waiver standard in the context of at-will employment).

In fact, citing[4] *Wright*, Petitioner acknowledges that this Court only applies the "clear and unmistakable" standard to waiver of the jury trial right by *unionized* employees, based on the fact that these employees do not individually bargain for and assent to the dispute resolution mechanisms to which they become bound, but rather rely on a bargaining representative (the union) to do so on their behalf. The rationale for requiring a heightened showing of proof of intent to waive the right to a jury trial in the collective bargaining context simply does not apply to at-will employees such as Petitioner, who had the option to review the terms of the DRP before she accepted it, and who manifested her acceptance and entered into the DRP separately through her choice to continue employment with the Company after October 1, 2001. Petitioner herself reveals that said rationale does not apply to her by observing that the "clear and unmistakable" standard is particularly necessary "where the employee has never signed any agreement *or manifested assent to arbitration*." (Pet. 20) (emphasis added). If this statement is true, then so is its corollary; where the employee has manifested assent to arbitration (including by a method other than signing an agreement, such as continued employment after a specified date), a heightened standard of proof of waiver is not necessary. As Petitioner admits that neither this Court nor any other has adopted her position or

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4. The remainder of the cases to which Petitioner cites in support of her position on this Question Presented for Review state general propositions of contract law or non-binding statements of state contract law which are not, in any case, at odds with the unanimously held position that waiver by an at-will employee need not be proven to a heightened evidentiary standard. Indeed, aside from *Wright*, which she admits is distinguishable because it involved unionized and not at-will employees, none of the other cases cited by Petitioner even mention the "clear and unmistakable" standard.

the rationale behind it[5], this Question is not appropriate for review by this Court.

2. Waiver of Arbitration by Removal to Federal Court

In her fourth Question Presented for Review, Petitioner asserts that an employer loses its right to enforce a valid arbitration agreement when it removes a case brought by an employee in state court to federal court, even when the employer asserts immediately upon removal the affirmative defense that the employee is required to arbitrate the dispute. Both the District Court and the Sixth Circuit quickly and properly disposed of this argument, with the Sixth Circuit

5. Petitioner claims that the "competing" principles involved in arbitration agreements have caused confusion in the lower courts, and that this confusion has been exacerbated by this Court's supposedly "lone guiding opinion on private agreements" in *Gilmer*. (Pet. 18). Yet, she cites to no cases from any lower courts exhibiting any such confusion. Indeed, this Court has made its policy clear regarding the favorability of private agreements to arbitrate in the employment context, and how such agreements are to be treated under the FAA, and has done so in a myriad of cases besides *Gilmer*. See, for example, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)):

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.

noting Petitioner's complete lack of relevant precedent to support her position, and the District Court explaining that "[c]learly, this is not so; the Company was merely both responding to plaintiff's complaint and exercising its right to federal court jurisdiction." (D.C. 12).

Instead of pointing to a split between the circuits on federal law, Petitioner cites to a lone case from this Court, *Lapides v. Bd. Of Regents of the University System of Georgia*, 535 U.S. 613, 624 (2002), as putative support for her contention that the Company waived its right to enforce arbitration by removing Petitioner's improvidently filed case to federal court. *Lapides* involved the attempt of the State of Georgia to remove a case from the state court forum, in which its sovereign immunity would be waived by state statute, to federal court, in which its immunity would remain intact, and this Court explicitly based its decision to find waiver by removal on the "unfair tactical advantage" of forum shopping that removal would provide to the sovereign.

As the Sixth Circuit pointed out when Petitioner raised this argument below, *Lapides* has not been applied outside the sovereign immunity context by *any* court, and furthermore, "[e]ven if *Lapides* did apply, the potentially unfair litigation tactics the Court was concerned about in *Lapides* are not present in this case. There is no evidence that an Ohio state court would have treated this case any differently than the federal court would have." (C.A. 8). Petitioner admits in her Petition and in the record below that principles of state law would apply to any contract formation issues. *See, infra*, Question Presented for Review No. 3; *see also* Petitioner's Response to the Motion to Stay 11-12. Furthermore, should the federal court find that no agreement to arbitrate exists and subsequently hear the underlying

dispute on its merits, the federal court would apply state law on any substantive state law claims, so forum-shopping would result in no benefit to the shopper.

Thus, the accepted rule is that removal does not constitute waiver of arbitration in the employment context. *Systran Financial Services v. Giant Cement Holding, Inc.*, 252 F. Supp. 2d 500, 507 (N.D. Ohio 2003) (quoting *Mantaline Corp. v. PPG Industries, Inc.*, No. 97-4473, 2000 U.S. App. LEXIS 14036 at *14-15 (6th Cir. June 8, 2000)) ("[A] party's attempt to defend its right to arbitrate cannot be used to show waiver"). *See also H&M Charters, Inc. v. Reed*, 757 F. Supp. 859, 865 (S.D. Ohio 1991) (quoting *Germany v. River Terminal Railway Co.*, 477 F.2d 546, 547 (6th Cir. 1973)) ("[W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of the contract, but attempts to meet all issues raised in litigation between it and another party to the agreement."). As Petitioner can muster absolutely no authority to support her position, much less demonstrate a split in the law in need of resolution, this Question need not be reviewed by this Court.

B. The Second and Third Questions Presented for Review State Settled Legal Propositions Which Were Properly Applied Below, and Merely Are an Attempt to Revisit the Facts of the Case.

1. "Knowing and Voluntary" Waiver

Neither this Court nor the Company dispute that a waiver of jury trial rights must be knowing and voluntary. *See, e.g., Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 670 (M.D. Tenn. 2004) (surveying Sixth

Circuit law applying the knowing and voluntary waiver standard to agreements to arbitrate); *RDO Fin. Servs. Co.*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) ("The federal standard for determining the validity of a contractual waiver of the right to a jury trial is . . . whether the waiver was made in a knowing, voluntary, and intelligent manner."); *Pellerin Constr., Inc. v. Witco Corp.*, Civ.Act.No.00-0465Sec.R(4), 2001 U.S. Dist. LEXIS 2934 at * 1 (E.D. La. Mar. 13, 2001) ("A party may waive its right to a jury trial only if it does so voluntarily and knowingly.") (internal citations omitted). In so stating this general principle of contract law, Petitioner's second Question Presented for Review does nothing to advance her case before this Court that her Petition should be granted; although she refers to "confusion that the courts, employers and employees currently face" with respect to her second Question (Pet. 22), she fails to cite a single case discussing the application — or the non-application — of the "knowing and voluntary" standard.[6] Instead, she resorts to making the unsupported and vague statement that "[i]n this case, as with many other cases that are now being decided by the federal courts, there was no knowing and voluntary waiver . . . Rather, Petitioner reasonably believed that she was not subject to arbitration." (Pet. 21). Unable to raise

6. In fact, Petitioner cites to only two cases in her entire discussion of this Question. One is *Wright v. Universal Marketing Services Corp.*, 525 U.S. 70, 80 (1998), which she cites for the proposition that the right to a judicial forum is "significantly important." The other is *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1130 (7th Cir. 1997), which she cites in her discussion of the right to a jury trial provided by the 1991 amendments to Title VII. Notably, Title VII is not even involved in this case. In any event, neither of these citations relate to the "knowing and voluntary" standard that she purports to be the source of "confusion" in the courts giving rise to the need for clarification by this Court through granting of her Petition.

even the specter of unsettled law on this point, Petitioner thus attempts to challenge the application of the settled law to the facts of record below.

Even if a review of the application of this correct statement of law to the facts below were a proper exercise for this Court, the record is clear that the law was correctly applied. The District Court found that Petitioner received a copy of the DRP and the Strang Memorandum, and attended an informational training session on the DRP, all of which specifically notified her that the DRP was a condition of her at-will employment and that her employment after October 1, 2001 would constitute an acceptance of the DRP. Thus, she knowingly waived her right to a jury trial on claims covered by the DRP when she voluntarily chose to remain employed with the Company after October 1, 2001. *See, e.g., Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 867 (S.D. Ohio 2003) ("As long as an employer gives an at-will employee proper notice of a new policy, and can show that the employee understood the new policy, the Court is hard pressed to conceive of how the policy, as long as it is not itself illegal, will not be enforceable as a term of the employee's employment."); *Jones v. Fujitsu Network Communs., Inc.*, 81 F. Supp. 2d 688, 692 (N.D. Tex. 1999) ("By continuing to work for Defendant after he received notice of the Arbitration Policy, Plaintiff accepted the arbitration policy as a matter of law.").

Petitioner's reliance on her refusal to sign any DRP documents as somehow affecting the validity of her waiver is misplaced. The knowing and voluntary manifestation of a waiver is determined by an objective standard. *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 934 (M.D. Tenn. 2003) (observing that courts follow "an objective

test to determine mutual assent" to arbitration agreements and that it is often "necessary to look beyond the words of the parties to their intent in considering mutual assent."). *See, also Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 664 (M.D. Tenn. 2004) ("Under the most basic principles of contract law . . . a contractual relationship can arise when circumstances, acts, and conduct of parties support a reasonable inference of mutual understanding and agreement. The agreement arises from the parties' intentions, presumed from their non-explicit language or conduct.") (internal citations omitted). Thus, Petitioner's acceptance of the DRP in the precise manner specified by the Company — her continued employment after October 1, 2001 — manifested her knowing and voluntary waiver.

Petitioner's subjective belief that, by continuing to work but refusing to sign the form acknowledging her receipt of the DRP materials, she would somehow remain outside the ambit of the DRP, is simply irrelevant. This subjective belief, even if sincerely held, was not, as Petitioner contends, "reasonabl[e]" under the circumstances, given that she had been given information directly to the contrary in the Strang Memorandum and through the DRP informational session she attended.[7] In any event, a subjective belief that her waiver was ineffective would be legally insufficient to override either the DRP's plain language or the objective manifestation of

7. Although Petitioner claims in her Petition that "clearly" she "believed that the agreement was only effective if signed" (Pet. 12), she conceded in her Response to the Motion to Stay that the Company "announced that the program was mandatory on anyone who continued working there." (Petitioner's Response 2). In light of her own admission, then, she cannot now claim to have "reasonably believed" that the Company would not enforce the agreement against her absent her signature on it.

her knowing and voluntary waiver. *See, e.g., Maier v. Pacific Heritage Homes, Inc.*, 72 F. Supp. 2d 1184, 1192 (D. Or. 1999) (holding that, despite the plaintiff-employee's statement in his affidavit that "I have never intended to release my claims against defendants and do not believe I have ever done so", the employee "cannot rely on his subjective beliefs to contradict the agreement's plain language or to create an ambiguity that does not exist") (internal cites omitted); *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 604-605 (D.S.C. 1998) (finding that plaintiff-employee's "subjective belief" as to the consequences of not signing an arbitration agreement with her employer, "even if it is believed," was legally insufficient); *Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 449 (3d Cir. 1988) (finding that plaintiff's "misguided subjective belief" that he was not waiving his right to bring a claim against his employer was "insufficient"). Petitioner's second Question Presented for Review accordingly provides no grounds for this Court to grant her Petition.

2. Right to Jury Trial under FAA Upon Finding of Question as to Formation

In her third Question Presented for Review, Petitioner again states a seemingly undisputed proposition of law, then attempts to lure this Court into a review of the application of this law to the facts below. Again, this Court should decline Petitioner's invitation to engage in this futile exercise, as there is no conflict in the law as to the Question she presents, and the law was correctly applied below.

Citing to Section 4 of the FAA, 9 U.S.C. § 4, Petitioner states that a jury trial applying principles of state law is required under the FAA "[i]f there is any question of contract formation". (Pet. 22). This statement, presumably an attempt

to paraphrase Section 4, is *almost* accurate. The relevant portion of Section 4 of the FAA states:

> *The court* shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue.

9 U.S.C. § 4 (emphasis added). As the italicized statutory language makes clear, Petitioner's statement that a jury trial "must" be held is only true where the court is first "satisfied" that the making of the agreement is "in issue". Thus, there must be more than just "*any* question of contract formation", or as she later states, "*any doubt or dispute* as to the actual formation of the agreement" (Pet. 22); instead, the making of the agreement must be in issue.

It is the well-settled law of this Court, and indeed, not the subject of any conflict among the circuit courts, that the statutory language of Section 4 of the FAA requires that before the issue is referred to a jury, the court must first determine whether it is "satisfied" that the formation of the contract is "in issue", a threshold question of law, not fact. 9 U.S.C. § 4; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination.") (citations

omitted). *See also Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995) ("Although the parties' intent controls regarding whether they agreed to arbitrate a particular dispute, determining their intent is a question of law for the court to decide."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1057, 1059 (11th Cir. 1998) (recognizing district court's power to compel arbitration if satisfied that there is no issue regarding contract formation and that "in any contract case, the parties' intent is controlling with regard to whether they agreed to arbitrate a particular dispute, and determining intent is a question of law for the court").

The District Court below, after examining the record and discussing the applicable legal precedent cited by both parties, expressly held that "[t]he test had been met in the instant case" and that it was "satisfied" that the agreement to arbitrate had been validly formed "as a matter of law" and that the dispute therefore was referable to arbitration. (D.C. 17). The record is clear that the law was properly applied in the proceedings below.

Petitioner was unable to cite to *any* legal authority to support her apparent position that she was entitled under the FAA to a jury trial based on her simple act of disputing the formation of the agreement to arbitrate,[8] rather than by providing legally sufficient evidence and authority to support such a declaration and "satisfy" the District Court that the formation of the

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8. Interestingly enough, Petitioner claimed below in her Response to the Motion to Stay that "there is not an issue with respect to the formation of an agreement to arbitrate." (Petitioner's Response 12). She now appears to base her third Question Presented for Review on the exact opposite contention: that there *was* an issue with respect to formation, that she raised this issue (despite her statement to the contrary), and that she was thus entitled to a jury trial.

arbitration agreement was "in issue". This is because the settled law holds precisely to the contrary; as the court in *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013, 1018-1019 (S.D.N.Y. 1971) observed,

> [T]he Act has provided that the court must be 'satisfied that the making of the agreement for arbitration * * * is not in issue'; otherwise there must be a trial on that issue. That test, however, cannot mean that a trial is necessary in every case where the court finds preliminarily that such an issue has been tendered. If, upon the papers submitted and after a hearing thereon, there emerges only a question of law on which the court is 'fully informed,' relief may be granted without a trial. After all, such an issue would never go to a jury in any case.

Id. at 1018-1019 (internal citations omitted). As she provides no authority supporting her polar opposite view, she has presented no basis for this Court to grant her Petition based on a conflict in the law.[9] Rather, she again resorts to the argument that the District Court improperly applied the law in finding that there was no legal issue as to the formation of her agreement to arbitrate with the Company. As before, the record refutes her contention.

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9. Likewise, any contention that the underlying law applied by the court in the determination as to whether formation of the agreement is "in issue" was in conflict and in need of resolution by this Court is unavailing, as the law to be applied by the court in these situations is state contract law, and thus will always, by necessity and by design, vary from case to case. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

It is important to note that Petitioner significantly misrepresents both the record and the applicable state law on this point. Her dissembling of the record in this case is discussed in further detail below, but merits specific mention here as well. Petitioner starts her description of the District Court's application of the FAA by noting that "state law [in this case the law of Ohio], and not federal law must be applied to determine if there was an actual agreement between the parties. This was not done in the instant case." (Pet. 22). While she is correct that Ohio law applies, her statement that it was not applied by the court below is patently false. District Court Judge Dowd specifically defined his inquiry as whether the DRP "constitute[d] a binding agreement with reference to Ohio contract law" (D.C. 11), and proceeded to cite Ohio law throughout his analysis. In fact, in her Response to the Motion to Stay, it was *Petitioner* who cited to law from outside the State of Ohio to support her claim that she had not assented to the agreement; the District Court properly corrected her mistaken reliance on this non-binding precedent as irrelevant in any case because it did not involve at-will employees.[10]

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10. *See* the District Court's discussion of Petitioner's "misplaced" reliance on *Robinson v. Ada S. McKinley County Services, Inc.*, 19 F.3d 359 (7th Cir. 1994) at D.C. 12-14. The District Court also noted the Petitioner's "unavailing" reliance on *Hardwick v. Sherwin Williams Co.*, No. 81575, 2002 Ohio App. LEXIS 7273 (Ct. App. Feb. 13, 2002), as that case involved an agreement under which only the employees, and not the employer, were bound to arbitrate disputes, and did not require acceptance of the agreement by continued employment, or even condition employment upon acceptance of the agreement. (D.C. 14, n.7). Nevertheless, Petitioner cited to *Hardwick* in her Petition, failing again to mention these fatal differences. (Pet. 23).

In her attempt to challenge its proper application below, Petitioner went on to mischaracterize Ohio law, blatantly misstating it in several places. For example, although she states that "Ohio law dictates that there is a presumption against forced arbitration of claims if the employee or party has not signed an agreement" (Pet. 22), neither of the two cases she cites to support this proposition (*Council of Smaller Enterprises v. Gates, McDonald & Co.*, 687 N.E.2d 1352, 1356-1357 (Ohio 1998); *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003)) involved either the employment context or an agreement such as the DRP which does *not require* an employee's signature for acceptance, but instead defines continued employment after a specified date as acceptance. As the District Court properly corrected her in its decision, under Ohio law, "[t]here is no requirement that an arbitration agreement be signed in order to be valid and enforceable," and, unlike Petitioner, the District Court cited to relevant Ohio authority on point, *Brumm v. McDonald & Company Securities, Inc.*, 603 N.E.2d 1141 (Ohio Ct. App. 1992). *See also Ross v. Bridgewater Constr., Inc.*, Ct.App.No.L-03-1029, 2003 Ohio App. LEXIS 5552 at **5 (Ct. App. Nov. 21, 2003) (citing *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973), and *Fisser v. Internatl. Bank*, 282 F.2d 231, 233 (2d Cir. 1960)) (observing that both Ohio and federal courts "have consistently held that to enforce an arbitration clause it is only necessary that the provision be in writing, and that it is not required that such writing be signed").

Petitioner mischaracterizes the record below by stating that "[i]n Petitioner's case . . . there was a question as to the formation of an arbitration agreement." (Pet. 23). The District Court held expressly to the contrary "as a matter of law" (D.C. 17), and the Sixth Circuit properly upheld this legal

conclusion, holding that, "even under Dantz's version of the facts in her appellate briefs" — which, as discussed below, contained much extraneous and erroneous information which had not been part of the District Court record, and thus not properly subject to consideration upon review — there was no issue as to Petitioner's assent to the agreement, and thus an agreement was formed as a matter of law. (C.A. 9, 13). The lack of any legal question as to the formation of the agreement made a jury trial unnecessary, and Petitioner's attempt in her third Question Presented for Review to misstate the law and its application in the record must fail.

II. The Petition Misstates the Record Below, and Raises No Basis For Review of the District Court's Proper Application of the Law.

According to Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Although Petitioner does not frame the issue as such in any of her Questions Presented for Review, her Statement of the Case and Facts and her Reasons for Granting the Petition make clear that the sole purpose of her Petition is to challenge the factual conclusions of the District Court below. What is worse, Petitioner attempts to add "facts" and contentions that were not included in the record at the District Court level, and thus are not subject to review by this Court even if it took on the task of assessing the factual findings below.

One of the cornerstones of appellate review is that the record available for consideration by an appellate court is limited to the record developed at the trial court level below; the appellate court may not — and should not, for reasons of finality and efficiency — consider facts outside of the trial

court's record. *See, e.g., Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796 (1929) (refusing to consider a document because it was outside "[t]he record, to whose consideration we are limited" and "cannot be looked to by us"); *Winters v. Pacific Gas & Elec. Co.*, No. 98-17136, 2000 U.S. App. LEXIS 5935 at *4-5 (9th Cir. Mar. 20, 2000) ("We have considered and deny Winters's motion to supplement the record with documents that were not created until after the grant of summary judgment as our review is limited to the record before the district court"); *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994) ("Parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below."). In this case, review by both the Sixth Circuit and this Court is limited to consideration of the record as it existed below before District Court Judge Dowd.

Petitioner begins her Petition with a long description of what she purports are the underlying "facts" of the case. However, most of these irrelevant "facts" were not included in the record below and are thus not subject to review by this Court. The documents containing the factual record before District Court Judge Dowd were the Complaint, the Answer, the Company's Motion to Stay (to which the Company's copy of the DRP and the Strang Memorandum were attached as exhibits), Petitioner's Response to the Motion to Stay (to which Petitioner's purported copy of the DRP, which was in actuality a later version of the DRP, was attached as an exhibit), the Affidavit of Seta Tchobanian (to which the form Petitioner "refused to sign" was purportedly attached as an exhibit[11]), and the Company's

11. This form is incorporated into the record by reference and description in the Affidavit. See Pet. 8 for a reproduction of this form.

Reply Memorandum in Support of Motion to Stay. As such, Judge Dowd was limited to these documents[12] in finding facts and rendering his decision, and subsequent consideration of that decision must be confined to this same record.

In both her filings with the Sixth Circuit and in her Petition to this Court, Petitioner did not, in fact, limit herself to the record presented to the District Court. Her efforts to include additional, and often conflicting[13] facts to the Sixth

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12. In discerning Petitioner's position, the District Court was limited to relying on the facts of the case as they were averred by Petitioner's counsel, as Petitioner did not enter any affidavits, including her own, into the record before Judge Dowd.

13. The Sixth Circuit took explicit notice of Petitioner's addition of inconsistent claims on appeal, specifically noting that although she alleged in her Complaint that she received a copy of the DRP in the fall of 2001, she claimed on appeal not to have received a copy of the DRP until June of 2002. (C.A. 2, n.1; 9, n.5). While acknowledging Petitioner's attempt to add to the record, the Sixth Circuit properly limited the scope of its review, finding that "the record before us does not give us cause to find that the district court's understanding of the underlying facts was clearly erroneous", and adopted the District Court's understanding of the factual record. (C.A. 2).

Amazingly, in her Petition, Petitioner changes her story yet again, now claiming that she *never* received a "full" DRP booklet, but only received the two-page agreement form attached to the later version of the DRP booklet. (Pet. 7, 11). Not only is this newest contention undercut by the very copy of the DRP which she submitted to the District Court (see Petitioner's Response to the Motion to Stay, Ex. A at 1, on which the words "I refused to sign this" are scrawled on the *front* of the DRP booklet, indicating that she was, in

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Circuit fell flat, as the Sixth Circuit noted her attempt to add to the record on appeal, then explicitly adopted Judge Dowd's "understanding of the underlying facts" of the case. (C.A. 2). Moreover, as Petitioner alludes in her Petition, the Sixth Circuit went even further in its ruling, finding that a valid agreement to arbitrate had been formed, "even under Dantz's version of facts in her appellate briefs." (C.A. 9, n.5). Thus, the "facts" that she attempted to add to the record on appeal, beyond not being the proper subject for review on appeal, did nothing to improve her case.

For the purposes of considering this Petition, the Court must have an accurate idea of the record that is properly before it. Unfortunately, it cannot depend on the Petitioner's Statement of the Case and Facts for this purpose. The background information regarding Petitioner's family life, her financial situation, and any allegations against the Company or any of its representatives that were not included in her Complaint before Judge Dowd or otherwise presented to the District Court, are not properly before this Court because they are not supported by any record evidence. Nevertheless, Petitioner dedicated several pages of her Petition to such irrelevant information merely for its inflammatory effect. (Pet. 1-4). Indeed, as both courts have found, Petitioner's claims against the Company are subject to arbitration, so the merits of her underlying allegations have not yet been addressed by any tribunal, and are immaterial to this Court in its consideration of this Petition. Rather, her appeal concerns only the enforceability of the DRP.

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fact, given the booklet and not just the agreement attached at the *back* of the booklet), it demonstrates her shifting and internally inconsistent version of the "facts" in this litigation, and her attempt to impermissibly add to the record below to suit her purposes before this Court.

The extent of Petitioner's mischaracterization of the record below with respect to the DRP is best illustrated by her most blatant omission. She quotes extensively from what she purports to be the DRP, leading this Court to assume that there was no dispute as to the language of the agreement at issue. (Pet. 5-7). However, she makes no mention of the fact that she submitted to the District Court a different version of the DRP (*see* Petitioner's Response to the Motion to Stay, Ex. 1) than that submitted by the Company (*see* Motion to Stay, Ex. A). The relevant difference between these two versions of the DRP is that the version submitted by Petitioner included an additional two-page "agreement" form at the end of the DRP booklet which contained the language cited in Petitioner's Statement of the Case and Facts referring to the *signing* of the DRP by employees. (Pet. 6-7). The version of the DRP submitted by the Company — the agreement to which both the District Court and the Sixth Circuit found that Petitioner had assented — *does not contain this additional two-page agreement, and thus does not contain this "employee signature" language. See* D.C. at 3, 4, 5, 18, 20 (referencing the Company's version of the DRP); C.A. 2, 4-5. Yet, the Petitioner makes no mention in her Petition that she is quoting from a document that both courts below found to have no bearing on her claim, and does not even alert this Court to the fact that there were conflicting versions of the DRP presented below.[14]

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14. In a related misstatement, Petitioner declares that "[e]ach and every other server at the restaurant had signed the agreement." (Pet. 7). This statement is not supported by any evidence in the record, and besides, is false in light of the fact that the "agreement" to which she refers is *her* version, the one containing the two-page agreement form. However, the distinction between the two versions of the agreement is largely irrelevant for purposes of this Petition, as the

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Petitioner goes on to present "facts" to this Court that are nowhere to be found in the record below, including a description of the Company's alleged attempts to obtain her signature on the DRP (Pet. 8-9), her contention that she requested and was denied additional discovery at the district court level (Pet. 10), and an extended discussion of a completely separate lawsuit which she has filed against the Company (Pet. 10-11, n.7).[15] Finally, in a desperate attempt to reargue the facts of the case, Petitioner makes several claims that the Company's evidence and/or statements were "false" — even though the District Court adopted the evidence and statements at issue as fact and the Sixth Circuit affirmed these findings. (Pet. 10-11). Most incredibly, Petitioner now makes the claims that she "never received an entire DRP" — a claim directly at odds with her shifting contentions below, first that she had received the DRP in the fall of 2001, and then that she had received the DRP in

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District Court found that Petitioner entered into the DRP that did not include the additional two-page agreement, and the Sixth Circuit agreed, and then further held that Petitioner would have been bound under the terms of *either* version of the agreement.

15. Petitioner laments in her Petition that the Sixth Circuit refused to consider the record in this other case as it was deciding her appeal of this case below. (Pet. 5, n.4; 10-11, n.7; 12). This objection to the Sixth Circuit's proper limiting of its consideration to the record of the case before Judge Dowd demonstrates Petitioner's basic misunderstanding of the function of appellate courts. As is the Court in this case, the Sixth Circuit was limited to considering the record of the District Court below. *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796 (1929); *Winters v. Pacific Gas & Elec. Co.*, No. 98-17136, 2000 U.S. App. LEXIS 5935 at *4-5 (9th Cir. Mar. 20, 2000); *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994). Consideration by the Sixth Circuit of evidence not presented to the District Court, and indeed from the record of a completely separate lawsuit, would have been improper.

June of 2002 (see C.A. 2, n.1) — and that she has since "learned" that the Strang Memorandum was "in fact never sent to employees". (Pet. 10, n.7, 11, 12). These statements, aside from being completely false, are not supported by record evidence below, and thus are not relevant for consideration before this Court.

The record below is clear that the relevant law was correctly applied to the facts, and that Petitioner is bound to arbitrate her claims against the Company. Notwithstanding her attempts now to add "facts" to the record and mischaracterize the proceedings and holdings below, Petitioner has presented this Court with no basis for granting her Petition for review of this case.

CONCLUSION

For all of the foregoing reasons, Petitioner has failed to provide a basis for this Court to review this case. As such, Respondent respectfully urges this Court to deny the Petition.

Respectfully submitted,

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